UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

NORFOLK SOUTHERN RAILWAY COMPANY,
Plaintiff,

v. Case No. 1:08-CV-618

CITY OF ALEXANDRIA, *et al*.,
Defendants.

NORFOLK SOUTHERN RAILWAY COMPANY'S AND RSI LEASING, INC.'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Preliminary Statement

This is a Federal preemption case. The City of Alexandria ("City") has unilaterally issued Permits to Norfolk Southern Railway Company ("NSRC") and its contractor, RSI Leasing, Inc. ("RSI"), containing restrictions on NSRC's ethanol transloading operation at its Van Dorn Yard (the "Yard") located in Alexandria, Virginia. Not only does City Ordinance 5-2-27 (the "Ordinance") and the permits issued thereunder (the "Permits" and, collectively with the Ordinance, the "Regulations") burden interstate commerce, they represent the City's admitted attempt to shut down the transloading operation entirely.

The City's attempt to restrict the ethanol transloading operation is precisely the type of local regulation Congress sought to eliminate through the Interstate Commerce Commission Termination Act, 49 U.S.C. §10105 ("ICCTA"), the Federal Railroad Safety Act, 49 U.S.C. §20106(a.) ("FRSA") and the Hazardous Materials Transportation Act, 49 U.S.C. § 5125 ("HMTA"). Because the Regulations are part of a pre-permitting requirement for NSRC to operate its ethanol transloading facility, and because they burden interstate commerce, the Regulations are preempted under ICCTA. Because the Regulations, as applied to the Facility, relate to rail safety, they are preempted under FRSA. The Regulations, as applied to rail and

motor carriers operating at the Facility, conflict with and pose an obstacle to the purposes of Congress in creating a nationally uniform regulatory program governing the transportation of hazardous materials, and thus are preempted under HMTA.

Statement of Undisputed Facts

1. NSRC is a "rail carrier," as defined in ICCTA, engaged in interstate commerce and a "railroad carrier," as defined in FRSA, operating an interstate railroad system in multiple states. Included as part of the system is the Yard. Stipulation of Facts ("Stip.") 1, 3.

2. Encompassed within the Yard is a separate, segregated area, the "Facility," that is used for transloading ethanol from rail tank cars to tank trucks ("trucks"). Stip. 3-4.

3. NSRC owns, contracted for the construction of, and bore all costs related to the construction of the Facility. NSRC handles all matters associated with its ownership of the Facility, including its maintenance, addressing security, safety and environmental issues, and paying taxes for the Facility. Stip. 5-6; Affidavit of David Lawson (attached as Exhibit 1) ¶ 9.

4. Ethanol is a hazardous material regulated by the United States Department of Transportation ("DOT"). Stip. 7.

5. Shippers contract with NSRC to have ethanol shipped to the Yard for transloading. A charge for the transloading of ethanol at the Facility is included ("bundled") in the price for the overall transportation of ethanol. Stip. 8-10.

6. Ethanol arrives at the Facility in railroad tank cars that hold approximately 29,000 gallons. The Facility can hold up to 20 tank cars on a specially designed unloading track and up to three rail cars can be transloaded at a time. While transloading operations currently are conducted from 7 am to 6 pm, the Facility is capable of operation 24 hours a day, 365 days a year. Stip. 15; Affidavit of Douglas McNeil (attached as Exhibit 2) ¶ 4.

7. Ethanol from one tank car will fill approximately 3.5 trucks. Since the Facility opened, the number of trucks into which ethanol is transloaded at the Facility has varied from day to day depending upon a number of factors. A report indicating the number of trucks accessing the Facility is attached as Exhibit 3. Stip. 16.

8. RSI conducts the transloading operation pursuant to a contract with NSRC. A copy of the contract is attached as Exhibit 4. RSI has eight employees that work at the Facility, seven of whom are transloaders and one of whom is the Facility manager. Stip. 19.

9. RSI has no role in communicating with customers, marketing, or pricing the transloading services, nor does RSI have any role in arranging for tank cars of ethanol to be transported to the Facility, or for tank trucks to be transported from the Facility. Stip. 20.

10. On April 25, 2008, the City informed NSRC that, pursuant to the original City Ordinance 5-2-27, NSRC would need a permit to operate its Facility. NSRC took the position that it did not need a permit from the City, and did not apply for a permit. Stip. 24.

11. At the May 27, 2008 City Council meeting, the Mayor of Alexandria stated publicly to NSRC "We are going to do everything we can to cease operations, shut you down and get you out of the city--okay--plain and simple." City Council Meeting Video at 2:18:40.

12. The minutes from the meeting of the May 27, 2008 City Council meeting state that "the city would do everything it could to get Norfolk Southern to cease operations, shut it down and get them out of the city." Minutes of May 27, 2008 City Council Meeting.

13. The Mayor and City Council issued a formal statement stating "the city is moving forward [to do] everything we can to shut down [the transloading facility]." Statement of the Mayor and City Council on the Norfolk Southern Ethanol Transloading Facility.

14. On June 3, 2008, the City issued a Permit to NSRC pursuant to the original City

Ordinance 5-2-27 ("Original Ordinance"). A copy of the Original Ordinance is attached as Exhibit 5. The Permit issued thereunder is attached as Exhibit 6. Stip. 26.

15. On June 14, 2008, the City amended Ordinance 5-2-27. A copy of the amended Ordinance (the "Ordinance") is attached as Exhibit 7. Stip. 28.

16. Attached collectively as Exhibit 8 are all Permits issued pursuant to the amended Ordinance either to NSRC or to RSI. Stip. 29.

17. The City did not comply with 49 U.S.C. §§ 5125(c) or 5112(b), as implemented by DOT in 49 C.F.R. Part 397, Subpart C, in implementing either the route or time of day restrictions contained in the Permits.

Factual Background

NSRC is a "rail carrier" as defined in ICCTA and a "railroad carrier" as defined in FRSA and is engaged in interstate commerce operating an interstate rail system. Stip. 1. NSRC owns the Yard, at which NSRC, with its own employees operates several transfer, local, and through trains daily. Stip. 15; McNeil Aff. ¶ 4.

Encompassed within the Yard is a separate area (the "Facility"), used for the transloading of ethanol from tank cars to trucks, that is segregated by physical barriers, including berm, spill containment and fences. Stip. 15. NSRC owns, contracted for the construction of, and bore all costs associated with constructing the Facility. Lawson Aff. ¶ 8. NSRC performs all transportation-related services associated with the Facility, including transporting cars to and from the Facility. NSRC markets the services available at the Facility, and markets, negotiates and enters into contracts with customers concerning the transportation services offered at the Facility. Lawson Aff. ¶¶ 5, 8-9; Stip. 6. NSRC inspects and maintains all transportation equipment within the Facility, including the tracks, ballast, cross ties, switches and other like fixed infrastructure other than that provided by RSI. Lawson Aff. ¶ 9. NSRC addresses fire, security, safety and

environmental issues at, and pays any taxes for the Facility. Stip. 5-6.

Ethanol is a motor fuel classified and regulated as a hazardous material by DOT. Ethanol generally is combined with unleaded gasoline at blending facilities with a resulting mixture to be provided to local gasoline filling stations for use in commercial and private vehicles. Stip. 7.

Pursuant to NSRC's transportation contracts with its customers, NSRC transports ethanol shipments to the Facility in rail tank cars and has arranged for the transloading of ethanol from tank cars into tank trucks so that the shippers/receivers can continue to transport the ethanol for ultimate delivery to sites determined by the shippers/receivers. Stip. 9. NSRC charges for the transportation of ethanol to the Facility, and bundled within that transportation charge is the cost for transloading the ethanol from the tank cars into tank trucks at the Facility. Stip. 10.

At present, one train daily enters the Yard transporting rail tank cars loaded with ethanol shipped from various locations in the mid-western and western United States. The loaded ethanol tank cars are placed at the Facility by an NSRC train switch crew on the specially designed unloading track. Stip. 12. The ethanol in the tank cars is then transloaded from the rail cars to empty tank trucks by NSRC's contractor, RSI. Stip. 13, 19. A NSRC train switch crew pulls the empty tank cars after they have been unloaded so the cars can be returned to their origins or otherwise used in the interstate rail transportation system. Stip. 14.

The ethanol arrives at the Facility in tank cars that hold approximately 29,000 gallons each. Ethanol from one tank car will fill approximately 3.5 trucks. Since the Facility opened, the number of trucks into which ethanol is transloaded at the Facility has varied from day to day depending upon a number of factors. Stip. 15-16.

After the ethanol is transloaded into trucks, it is transported to various gasoline blending facilities outside of the city. The Facility is capable of operating around the clock, but currently

operates between 7 am to 6 pm Monday through Friday. Stip. 17; McNeil Aff. ¶ 4.

RSI conducts the transloading operation pursuant to a contract with NSRC (the "RSI Agreement"), which defines RSI's responsibilities at the Facility. A copy of the Agreement is attached as Exhibit 4. Stip. 19. Pursuant to the Agreement, NSRC pays RSI for performing the transloading services based on the volume of ethanol transloaded. Exhibit 4.

RSI has no role in communicating with customers, marketing, or pricing the transloading services, nor does RSI have any role in arranging for ethanol to be transported to the Facility, or for trucks to transport ethanol from the Facility. Stip. 20. NSRC maintains oversight responsibility at the Facility. RSI regularly consults with NSRC with regard to anything not directly associated with the physical transloading of ethanol. Affidavit of Tony Rosenthal (attached as Exhibit 9) ¶¶ 8-9. With regard to transloading operations, NSRC advises RSI as to policies and procedures, and can direct the manner of its operations. Lawson Aff. ¶¶ 9-11.

On or about April 25, 2008 the City notified NSRC that a permit was necessary to operate the Facility. Stip. 24. NSRC took the position that it did not need to obtain a permit from the City and did not apply for a permit. Stip. 25. On June 3, 2008, the City nonetheless issued a Permit pursuant to the original Ordinance. Stip. 26. By letter dated June 4, 2008, NSRC reiterated its position that the City did not have authority to issue the Permit, and that, as applied to the Facility, the Regulations were preempted and inapplicable. Stip. 27. NSRC directed its contractor, RSI, that it need not comply with the Permit. Stip. 30.

After NSRC notified the City that it did not have the authority to issue the Permit, the City began a concerted effort to close the Facility. At a City Council meeting held on May 27, 2008, the City Attorney informed the City Council in open session that he would draft an amendment to the original Ordinance to make clear that Alexandria had jurisdiction to regulate

the Facility. The Mayor stated publicly to NSRC at the meeting "We are going to do everything we can to cease operations, shut you down and get you out of the City--okay--plain and simple." The minutes from the meeting specifically state that "The city would do everything it could to get Norfolk Southern to cease operations, shut it down and get them out of the city." A formal statement issued by the Mayor and City Council specifically states that "[T]he city is moving forward [to do] everything we can to shut down this facility…." The City amended the Ordinance on June 14, 2008 in an attempt to extend its application to cover the Facility. Stip. 28.

The first Permit issued by the City is to NSRC, listing the Facility address. Exhibit 6. Subsequent Permits were issued to NSRC's contractor, RSI, again listing the Facility address. Exhibit 8. While the City has issued several Permits from time to time, they all are temporary in nature, typically lasting for 30 days, and they all contain the following restrictions:

> Hauling is permitted Monday through Friday, 7 am to 7 pm only.
> Hauling is limited to a maximum of 20 trucks per day.

In addition, the Permits dictate the route tank trucks must use when hauling ethanol from the Facility. However, the City did not comply with 49 U.S.C. §§ 5125(c) or 5112(b) in setting either the route or time of day restrictions.

While the number of trucks into which NSRC transloads ethanol varies from day to day, NSRC has transloaded into many more than 20 trucks on several days, and into as many as 41 trucks on a single day. Stip. 16. If the City had been enforcing the requirements contained in the Permits, NSRC and RSI would have been in violation of the Permits, and subject to criminal sanctions, on more than 75 occasions since beginning operations in April, 2008. Stip. 16.

If enforced, the restriction on the number of trucks that could access the Facility, and the time during which transloading could take place, would impact the number of tank cars that could be transloaded, notwithstanding the number of tank cars in the interstate rail system bound

for the Facility, resulting in delayed delivery of ethanol as well as congestion at the Yard and downstream elsewhere on the NSRC rail system, creating a backup not only for ethanol customers but other NSRC customers. McNeil Aff. ¶¶ 5-6. Further, the return flow of tank cars to ethanol processing facilities for re-loading would be interrupted, instead being held in-transit storage awaiting transloading. McNeil Aff. ¶ 5.

Faced with potential criminal sanctions for the continued operation of its ethanol Facility absent compliance with the Regulations, NSRC filed this Complaint, seeking, among other things, a declaration that both the Ordinance, as applied to the Facility, and the Permits are preempted by ICCTA, FRSA and HMTA. The City filed an Answer and Counterclaim seeking a declaration that it is authorized to regulate as set forth in the Ordinance. In addition, the City filed a third party claim against RSI seeking the same declaration.

Meanwhile, on June 17, 2008, one day after NSRC filed this action, the City filed a Petition for Declaratory Order with the Surface Transportation Board ("STB" or "Board") seeking a Board determination of whether the Facility is a railroad facility covered by ICCTA. On July 1, 2008, NSRC filed its response. On November 6, 2008, the Board directed NSRC to provide certain additional information in order for the Board to make its final determination. NSRC's Response is due on November 26, 2008.

Argument

The City's Regulations as applied both to NSRC's Facility and the tank cargo trucks transporting ethanol from the Facility, are preempted by the express preemptive provisions of three federal statutes, i.e. ICCTA, FRSA, and HMTA.

I. THE ORDINANCE AND PERMITS ARE EXPRESSLY PREEMPTED BY ICCTA

ICCTA created the STB, granting it *exclusive* jurisdiction over transportation by rail carriers. 49 U.S.C. §10501(b). Specifically, 49 U.S.C. §10501(b) states:

> The jurisdiction of the [Surface Transportation] Board over –
>
> (1) transportation by rail carriers, and the remedies provided in this part with respect to … routes, services, and facilities of such carriers; and
>
> (2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
>
> is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. §10501(b). Thus, pursuant to ICCTA, the STB is vested with exclusive jurisdiction with respect to regulation of "transportation by rail carriers." ICCTA expansively defines "transportation" to include: "yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use." 42 U.S.C. §10102(9). Thus, ICCTA imposes on railroads a regulatory scheme that courts have recognized as "among the most pervasive and comprehensive of federal regulatory schemes." *City of Auburn v. United States*, 154 F.3d 1025, 1029 (9th Cir. 1998) (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)).

Courts have interpreted the exclusive jurisdiction provisions of 49 USC 10501(b) broadly, emphasizing that "it is difficult to imagine a broader statement of Congress's intent to preempt state regulatory authority over railroad operations." *Id.* at 1030 (quoting *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

> [T]here is no evidence that Congress intended any… state role under the ICCTA to regulate the railroads. *** [T]he congressional intent to preempt this kind of state and local regulation of rail lines is explicit in the plain language of ICCTA and the statutory framework surrounding it.

Id. at 1031. One central purpose of Congress in enacting ICCTA was specifically to eliminate the few areas where states had regulatory authority over railroad facilities and operations. *See, e.g., Friberg v. Kan. City S. Ry. Co.*, 267 F.3d 439, 443 (5th Cir. 2001); *CSX Transp., Inc. v. Ga. Pub. Serv. Comm'n*, 944 F. Supp. 1573, 1583 (N.D. Ga. 1996); H.R. No. 104-311, 104th

Congress 1st Sess. at 82-83 (1995), *reprinted* in 1995 U.S.C.C.A.N. 793, 807-808.

As the STB has held, "to come within the preemptive scope of 49 USC 10501(b), [the] activities under [scrutiny] must be both: (1) transportation; and (2) performed by, or under the auspices of, a rail carrier." STB Finance Docket No. 34192 (Sub-No. 1), *Hi Tech Trans, LLC--Petition for Declaratory Order--Newark, NJ* (served August 14, 2003), slip op. at 5. *See also*, *N.Y. Susquehanna & W. R. Corp. v. Jackson*, 500 F.3d 238, 247, 249 (3d Cir. 2007) (the transloading, performed by the rail carrier's contractor, of material from trucks to a railcar comes within the preemptive scope of 49 USC 10501(b)); *Canadian Nat'l Ry. Co. v. Rockwood*, (Civil Case No. 04-40323), 2005 U.S. Dist. LEXIS 40131, at *9 (E.D. Mich. June 1, 2005) (same as to the transloading of material from a railcar to trucks). If the activity sought to be regulated is covered by 49 U.S.C. §10501(b), the analysis then turns to whether the regulation itself unreasonably interferes with interstate commerce. *See, e.g., Jackson*, 500 F.3d at 254.

If the regulation under scrutiny consists of a pre-permitting or pre-clearance regulation, further analysis is hardly necessary, because the reservation of the local jurisdiction of the right to withhold authority to conduct transportation perforce constitutes an unreasonable interference with interstate commence. The Second Circuit summarized the law as follows:

> The [Surface] Transportation Board has likewise ruled that "state and local permitting or preclearance requirements (including environmental requirements) are preempted because by their nature they unduly interfere with interstate commerce."

Green Mountain R.R. Corp. v. Vermont, 404 F.3d 638, 642 (2d Cir. 2005) (citation omitted).

ICCTA applies in the instant case because the transloading operation at the Facility is transportation by or under the auspices of NSRC, a rail carrier. It does not matter that the actual transloading is done by NSRC's contractor, RSI, nor that the City will claim that the Ordinance merely regulates truck traffic to and from the Facility. Moreover, because compliance with the

Permits would unreasonably interfere with interstate commerce, they are preempted.

A. Ethanol Transloading at the Facility is Rail Transportation

ICCTA's definition of "transportation" covers transloading services occurring at the Facility as the services relate to the "movement, including receipt, delivery… transfer in transit… handling and interchange of… property." 49 U.S.C. §§10102(9)(a)-(d). *See id.* at 644 (the railroad's "proposed transloading and storage facilities are integral to the railroad's operations and are easily encompassed within the… Board's exclusive jurisdiction over 'rail transportation.'"); *Jackson*, 500 F.3d at 247 ("It is undisputed that operations of the facilities include dropping off cargo, loading it onto Susquehanna trains, and shipping it. Thus the facilities engage in receipt, storage, handling and interchange of rail cargo, which the Termination Act explicitly defines as 'transportation.' These operations fit within the plain text of the Termination Act preemption clause.") (citation omitted); *id*. at 248 ("transloading operations are 'transportation'" under ICCTA). *See also Grafton & Upton R. Co. v. Town of Milford*, 337 F. Supp. 2d 233, 239 (D. Mass. 2004); *Norfolk S. Ry. Co. v. City of Austell*, No. CIVA1:97-CV-1018-RLV, 1997 WL 1113647, at *6 (N.D. Ga. Aug. 18, 1977); *Rockwood*, 2005 U.S. Dist. LEXIS 40131, at *9.

The transloading facilities at the Yard are an integral part of the rail facilities NSRC use in providing interstate transportation services. William Landrum, NSRC's corporate designee responsible for the ethanol accounts, states: "A customer cannot ship ethanol to the Facility without it being transloaded at the Facility, and ethanol may only be transloaded at the Facility by Norfolk Southern through its contractor." Affidavit of William Landrum (attached as Exhibit 10) ¶ 4. Landrum also states that "rail transportation of ethanol to Norfolk Southern's Van Dorn Street Yard would be useless to the rail transportation customer without the provision of the transloading services, because otherwise there would be no way of getting the ethanol from the railroad to the blending facility destinations." Landrum Aff. ¶ 4.

B. Ethanol is Transloaded By or Under the Auspices of NSRC

The City contends that, even if transloading is "transportation," ICCTA preemption does not apply because the transloading is not *by a rail carrier*, because NSRC has contracted with RSI to perform the actual transloading services on NSRC's behalf. Transloading is, however, transportation by a rail carrier even where the actual transloading is done by a third party contractor. This was the conclusion of the court in *Jackson*. *See Jackson*, 500 F.3d at 249-50.[1]

Other federal courts have reached the same conclusion. In *Rockwood*, the District Court observed:

> Here, the relationship of IWG to CN is not one of a shipper to a carrier, but one of a contractor working "under the auspices of a rail carrier." IWG is not CN's customer. Rather, IWG provides transloading services so that CN may complete its obligations under CN's transportation agreements with its shippers. It is CN, the railroad, who is holding itself out as providing the CDD transloading services. CN interacts with the shippers, quotes rates, contracts, bills and collects. Thus, the CDD transloading services occurring at CN's transload facility are "performed . . . under the auspices of a rail carrier holding itself out as providing those services." For this reason, the activities occurring at the Rockwood transload facility appear to be "integrally related to the provision of interstate rail service," and are therefore subject to the STB's jurisdiction and federal preemption.

Rockwood, 2005 U.S. Dist. LEXIS 40131, at *18 (internal citations omitted). *See also Coastal Distrib., LLC v. Babylon*, No. 05 CV 2032 JS ETB, 2006 WL 270252, at *6 (E.D.N.Y. Jan. 31, 2006), (concluding that Congress "did not draw a distinction between a railroad and a party it

[1] In *Jackson*, the court examined several factors that distinguished the contractor relationship in the case before it with the licensee relationship it reviewed in an earlier case. The court in *Jackson* determined that the contractor relationship brought the transloading within ICCTA's preemption coverage. The court noted that, in the case before it, the transloading was by a contractor in part because "(1) the rail carrier owned (or leased) the land and built the transloading facilities, (2) shippers pay the rail carrier to load their freight, and (3) the rail carrier does not disclaim liability for the loading process." This was distinguished from the licensee scenario not covered by ICCTA, among other things, the transloader (1) "operated the transloading facility under a license agreement," (2) "constructed and maintained the facility", and (3) the rail carrier "did not charge shippers a fee for using the… transloading facility…." Each of these distinctions are equally applicable here, and demonstrate that the transportation (transloading) is being performed by a contractor "under the auspices" of NSRC, the rail carrier.

contracts with," and that "transportation" includes a facility "related to the movement of property by rail - no matter whether the railroad owns and operates the facility or contracts with a third party to operate the facility"), *aff'd*, 216 Fed. Appx. 97 (2d Cir. 2007).

NSRC owns the Yard and the Facility. NSRC designed, built and operates the Facility. David Lawson, NSRC's Vice President of Industrial Production and a corporate designee, states:

> Norfolk Southern is the responsible party for the movement of ethanol into, and the transloading of ethanol at, the Facility, in that Norfolk Southern is the sole party entitled to market the movement of ethanol to, and transloading at, the Facility. Norfolk Southern is the sole party able to set and receive a fee for the transloading of ethanol at the Facility, if any fee is separately assessed for that service.

Lawson Aff. ¶ 5. Kelley Minnehan, RSI corporate designee, explains RSI's limited role at the Facility:

> RSI does not have any involvement whatsoever with the delivery of the ethanol to the tank cars. RSI has no involvement in the movement of the ethanol from the Facility to the various destination blending facilities other than performance of the operations attendant with the transloading.
>
> RSI does not have any contract associated with the Facility with any of the trucking companies that arrive to pick up ethanol, the customers that send ethanol to the Facility, or the receivers that receiver product from the Facility. None of RSI or its affiliates has any contractual, financial, or other relationship with any of the receivers or other bill of lading party. In fact, there is no relationship – financial or otherwise – with any party other than Norfolk Southern as it relates to any shipments moving through the Facility.

Affidavit of Kelley Minnehan (attached as Exhibit 11) ¶¶ 5-6. The record is clear. RSI is a contractor to NSRC in the performance of its interstate rail transportation services. The Facility and the transloading transportation operations at the Facility come within the purview of the preemption provisions of 49 U.S.C. §10501(b).

C. The City's Regulation is Preempted by ICCTA

Soon after Congress enacted ICCTA, the STB formulated the framework for determining whether ICCTA preempts a state or local regulation, striking a balance between "the right of

state and local entities to impose appropriate public health and safety regulations on interstate railroads" on the one hand and the prohibition against "interfer[ing] with or unreasonably burden[ing] railroading on the other." *See King County*, No. 33095, 32974, 1 S.T.B. 731, 1996 WL 545598, at **3-4 (S.T.B. Sept. 25, 1996). In *Cities of Auburn & Kent*, (No. 96-71051, 97-70022, 97-70920), 2 S.T.B. 330, 1997 WL 362017 (2 S.T.B. July 1, 1997), *aff'd*, 154 F.3d 1025 (9th Cir. 1998), the STB addressed the scope of preemption: "[W]here the local permitting process could be used to frustrate or defeat an activity that is regulated at the Federal level, the state or local process is preempted." *Id.* at *6. ICCTA preempts a state or local regulation unless it passes a two-part test: (1) it is not unreasonably burdensome, and (2) it does not discriminate against railroads. *Id.* at 253.

The City, through its Ordinance and the issuance of the Permits, has attempted to regulate the Facility principally by requiring a permit for Facility operation, restricting the Facility's hours of operation, and limiting to 20 the number of trucks that can access the Facility. The attempt to restrict or eliminate the ability of its customers to access the Facility is a regulation of the Facility itself, in this case with the avowed purpose of making operations at the Facility so untenable that the Facility must shut down.[2] Alone this would constitute an unreasonably burden interstate commerce. But in addition, the City claims the ability to withhold issuance of Permits altogether, and to revoke existing Permits,[3] thus choking off all access to the Facility.

[2] The City has stated in unequivocal terms that its goal is not to regulate, but to drive the Facility from Alexandria. The Mayor has stated in public meetings that he intends to shut down the Facility, the minutes from City Council meetings state this goal specifically, and the Mayor and City Council have issued formal statements to that effect. The ordinance was amended from one designed to regulate trucks hauling debris to include the transport of hazardous material solely for the purpose of closing down the Facility. Indeed, the City inserted language into the most recent version of the Permit specifically stating that it "may be revoked" depending on the outcome of this litigation. See Exhibit 8.

[3] The underlying assumption in a permitting regime is the right to withhold issuance of the permit. The Permits include provisions for the "revocation of this permit."

1. The Ordinance and the Permits are Preempted as Part of a Permitting Process, Regardless of How the City Characterizes Them

The City claims that the Ordinance is a health and safety regulation, not economic regulation preempted by ICCTA. But Courts routinely find that ICCTA preempts state and local laws requiring a permit before a railroad can act, regardless of the avowed nature of the regulation. In *Green Mountain*, for example, the Second Circuit held that ICCTA's express preemption clause applies to a state's permitting requirement for construction of a transloading facility. 404 F.3d at 643. The court concluded that the construction permitting requirement was just "[l]ike the regulations and ordinances consistently struck down by federal courts…." *Id.* The Second Circuit concluded as follows:

> We need not draw a line that divides local regulations between those that are preempted and those that are not, because in this case preemption is clear: the railroad is restrained from development until the permit is issued; the requirements for the permit are not set forth in any schedule or regulation that the railroad can consult in order to assure compliance; and the issuance of the permit awaits and depends upon the discretionary rulings of a state or local agency.

Id. The court flatly rejected the state's contention that the regulation could not be preempted on its face unless there was "no possible set of conditions that [the permitting authority] could place on its permit that would not conflict with federal law." *Id*. The Second Circuit explained why the simple requirement for a permit must be preempted:

> No doubt, there could be permit application affecting railroad facilities that could be promptly approved without the slightest imposition on rail operations. However, what is preempted here is the permitting process itself, not the length or outcome of that process in particular cases.

Id. at 644.

Faced with a similar set of circumstances, the Ninth Circuit in *Auburn* concluded that the permit requirements at issue in that case were preempted. The city's permitting process required environmental review before the railroad could reacquire and re-establish one of its routes. 154

F.3d at 1025-27. The STB, having reviewed the permitting process, concluded that the permit requirement was unenforceable under ICCTA. *Id*. at 1027-28. On appeal, the city argued that, while ICCTA may preempt *economic* regulations, it does not preempt *environmental* regulations, which fall within the "traditional state police power." The Ninth Circuit rejected the argument:

> However, the pivotal question is not the nature of the state regulation, but the language and congressional intent of the specific federal statute.
>
> ….
>
> [G]iven the broad language of § 10501(B)(2)… the distinction between "economic" and "environmental" regulation begins to blur. For if local authorities have the ability to impose "environmental" permitting regulations on the railroad, such power will in fact amount to "economic regulation" if the carrier is prevented from constructing, acquiring, operating, abandoning or discontinuing a line.

Id. at 1031. Thus, it does not matter how the City characterizes its regulations, only that it attempts to vest with the City control over NSRC's transloading Facility.

2. The Court Need Not Find that the Conditions Imposed by the Permits are Individually Preempted to Find the Ordinance Preempted

Importantly, for ICCTA preemption to apply, the court need not examine the effect of the individual regulations. As the Second Circuit in *Green Mountain* and the Ninth Circuit in *Auburn* made clear, it is the requirement of the Permit *standing alone* that burdens interstate commerce. The District Court in *Boston & Maine Corp. v. Town of Ayer*, 191 F. Supp. 2d 257 (D. Mass. 2002) addressed this distinction. At issue was a permitting requirement for the construction of a new facility for the unloading of automobiles from rail cars. *Id*. Affirming the STB's decision that the permitting requirement was preempted, the court refused "to hold an evidentiary hearing [on each individual condition in the construction permit or "Certificate"] because those conditions were imposed as part of the certificate, not individually." Because "[t]he STB found that the permit process was preempted," the court found that "the thirty-six conditions fail as part of the permit process." *Id*. at 262.

Thus, the court need not examine the conditions the City has placed within the Permits themselves. The court need only examine the fact that the City contends that no access is allowed to the Facility absent the Permit, and to note that the conditions contained within the Permits are unilaterally imposed by the City as part of a permitting process. The Ordinance, as applied to the Facility, and the Permits are preempted.

3. If Enforced, the Permits Would Constitute an Unreasonable Burden on Interstate Commerce

Even if the Court finds that the Ordinance is not preempted as a permit that can be withheld, and thus eliminate interstate commerce, the Permits and the conditions imposed therein are nonetheless preempted as unreasonably burdening interstate commerce. Specifically, the conditions contained in the Permits read as follows:

> Hauling is permitted Monday through Friday, 7 am to 7 pm only.
> Hauling is limited to a maximum of 20 trucks per day.

If enforced, these regulations would constitute an unreasonably burden interstate commerce.

The City cannot claim that it is merely attempted reasonable regulation of its streets by limiting the transloading operation to 20 trucks per day during restricted hours of operation. First, implicit in that claim is the assumed right to restrict access to a point where it is not feasible to operate at all.[4] Second, the City has not even attempted to hide its motive in

[4] At some point – indeed at the 20 truck limit currently imposed – the Permit restrictions would make it economically unfeasible for NSRC to operate the Facility, essentially forcing the Facility out of the market and forcing the market elsewhere. David Lawson specifically testified to the adverse effect on revenue of any restriction of "our ability to haul the business that we have sized this facility for…." Lawson Dep. at 63 (excerpts attached as Exhibit 12). Kelley Minnehan of RSI echoed the concern, noting that, based on its "per volume" compensation structure in the NSRC contract, "we couldn't operate there on only that little [20 trucks per day] volume." Minnehan Dep. at 51 (excerpts attached as Exhibit 13). The City seems to argue, as evidenced in the following colloquy in Trainmaster James Reiner's deposition, that imposing a restriction that has the direct effect of limiting the demand for interstate transportation should be saved as a reasonable restriction on interstate commerce just because it has the desired effect: "Q. And the situation you describe [involving rail congestion] would only occur if shippers continued to ship

amending the Original Ordinance and issuing the Permits, has not attempted to justify the 20 trucks per day as a safety measure, and has not rationalized the limitation with the statement in its Counterclaim that the Facility is at a location "completely inappropriate" for transloading of *any* ethanol. Counterclaim ¶ 5. The City's use of regulation as an attempt to run NSRC's transloading Facility out of Alexandria is exactly what ICCTA's preemption provision prohibits.

If the Permits were enforceable, in the eight months that the Facility has been in operation, NSRC and RSI have been in violation of the Ordinance and the Permits issued by the City *more than 75 times.* Exhibit 3. Indeed, using the plain language of the Ordinance, on more than 75 occasions NSRC and RSI would be considered "guilty of a Class II misdemeanor" if the Permits were not preempted. Without question, the Ordinance and the Permits issued thereunder would severely restrict NSRC's current operation.

If enforceable, the restrictions would have a ripple effect of congesting not just the Yard, but other locations elsewhere on the NSRC interstate rail system as well, affecting not only the delivery of ethanol but other commodities as well. Trainmaster James Reiner testifies to what would happen as ethanol tank cars backed up in the Van Dorn Yard:

> [L]imiting the number of trucks that leave our ethanol facility directly affects how many rail cars can be unloaded…. [I]t would just be a short amount of time before my tracks would be full -- and I wouldn't be able to switch the traffic for my other customers and service my other customers as well.

Reiner Dep. at 45. The adverse effect would not be limited to Yard, it "would have potentially congestion-related effects" and adversely affect the "continuous movement of freight through our yards, and so backing up freight in [other] yards…." Lawson Dep. at 63. This adverse

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the same quantity of ethanol; is that correct? A. I would have to say so, yes." Reiner Deposition (excerpts attached as Exhibit 14) at 46. It is untenable to maintain that the Ordinance could constitute a reasonable burden on interstate commerce because it will have the desired effect of quashing the demand for the same.

effect could ripple through the NSRC rail system. McNeil Aff. ¶ 7; Lawson Dep. at 73.

Further, each of the Permits is for only a thirty day period. If upheld, this limitation would have a significant adverse effect on shippers and NSRC. The concern that a permit would not be reissued after a limited issuance period, "is tantamount to an inability to operate because [NSRC doesn't] know whether the next permit is going to be retroactive or is going to further restrict the number of trucks permitted, or even whether the next permit will be issued at all." Lawson Aff. ¶ 13. The effect would be the same for shippers seeking to move ethanol in interstate commerce. "Shippers cannot use our transportation services if they do not know whether we can fulfill their transportation requirements and actually deliver the product where it is sent." Lawson Aff. ¶ 14.

Finally, if the Ordinance and the Permits are enforceable, the potential effect on interstate commerce would be far more wide ranging than described above. Indeed, "[o]ther municipalities like Alexandria might decide to issue haul permits, then all of a sudden this cascading effect of haul permits could have a very negative and detrimental effect on interstate commerce for the movement of ethanol or any other potentially hazardous material." Lawson Dep. at 64-65. If the City of Alexandria has the right to regulate ethanol transloading traffic and the hours of the Facility's operation, then every other municipality has the same right. NSRC and other interstate freight rail carriers would be subject to the regulatory whims of every city, county or town seeking to impose restrictions on the railroad's transloading activities.[5]

In the instant case, NSRC is at the mercy of the City with regard to its transloading Facility. The Permits have been unilaterally issued limit transloading operations to 20 trucks a

[5] This is not an idle concern, as NSRC was aware of the fact that Baltimore, Philadelphia and Cleveland, among other jurisdictions, followed the case involving the routing of hazardous materials through Washington, D.C. to see whether they would be able to enact similar restrictions. Mr. Lawson is concerned that other municipalities may attempt to similarly regulate ethanol transload facilities if the Ordinance and Permits are upheld. Lawson Aff. ¶¶ 15-16.

day, but there is no way to know whether in the future that number will be reduced. Moreover, the Permits are issued for thirty (30) day periods, but there is no way to know whether access to the facility by truck withheld altogether through a failure to renew a Permit. In essence, if the Ordinance is enforceable, then NSRC operates its transloading Facility at the City's sole discretion. If the City has the right to regulate the Facility out of existence, that is exactly what the City will do. The Ordinance and the Permits are preempted under ICCTA.

II. ORDINANCE AS APPLIED TO FACILITY IS PREEMPTED BY FRSA

A. Under FRSA's Express Preemptive Provision, Congress Preempted Regulation of Railroad Safety, with Two Limited Exceptions for *State* Regulation

When Congress enacted FRSA, its stated goal was to improve railroad safety by opting to provide for national uniformity in the regulation of railroad safety - finding that railroad safety would not be improved if railroads were subjected "to a variety of enforcement in 50 different judicial and administrative systems." 1970 *U.S.C.C.A.N.*, at 4109. As the Fourth Circuit has held, "congressional intent in FRSA is clear," emphasizing that "railroad safety is better served by uniform federal action rather than 'by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems.'" *Rayner v. Smirl*, 873 F. 2d 60, 64 (4th Cir. 1989).

In order to achieve its stated purpose of providing for national uniformity under FRSA, Congress enacted the express preemption provision of 49 U.S.C. Section 20106(a.). Under §20106(a.) FRSA preempts all non-federal regulation of a subject matter that relates to railroad safety with two limited exceptions for *state* regulation. The first exception permits *state* regulation of railroad safety until or unless the Secretaries of Transportation [DOT] or Homeland Security [TSA] issue a regulation relating to railroad safety or security that "substantially

subsumes" the subject matter of the *state* regulation. In *CSX Transportation, Inc. v. Easterwood,* 507 U.S. 658, 665; (1993), the Supreme Court held that FRSA preempts statewide regulations if the federal regulations "substantially subsum[ed]" the subject matter of the statewide regulation noting that FRSA's preemption provision applies to any regulation issued by the DOT that relates to railroad safety regardless of the statutory authority under which it has been issued and that non-federal regulation that relates to railroad safety is preempted under FRSA even if the purpose of the non-federal regulation is different from the purpose of the federal regulation. *Id.* at 663 n.4, 675. Thus the City's avowed motive for amending its Ordinance (to regulate truck traffic) is not relevant provided *its effect* is to regulate a subject matter that relates to railroad safety.

The second exception to FRSA preemption permits *states* to regulate a subject matter relating to railroad safety, despite regulation of the subject matter by either DOT or TSA, provided the *state* is regulating an "essentially local safety hazard." 49 U.S.C. § 20106(a)(1-3). *See Union Pacific Ry. Co. v. Cal. Pub. Utils. Comm'n*, 346 F3d.851 (9th Cir. 2003).

B. FRSA Preempts All Municipal Ordinances Related To Railroad Safety

The two exceptions to FRSA preemption are available only to *states*, not to municipalities. Hence, municipalities, such as Alexandria, are wholly preempted under FRSA from regulating *any* subject matter that relates to railroad safety, even if the DOT has not regulated the subject, the purpose of the municipal regulation does not involve railroad safety and the state has purportedly delegated authority to regulate the subject matter to its municipalities. In *Consolidated Rail Corp. v. Smith***,** 664 F. Supp. 1228 (N.D. Ind. 1987), the court held that FRSA precludes states from delegating authority to regulate essentially local safety hazards to their municipalities, noting

> Finally, the municipalities suggested construction of section [20106(a)] utterly would defeat Congress' purpose in enacting the FRSA enhancement of railroad

> safety by making railroad regulation uniform. Congress was concerned that the existence of fifty separate regulatory systems in the fifty states would undermine safety. If so, separate regulation by every city, village, township, or hamlet along the mainline would undermine safety infinitely more. Separate municipal regulation of speed [railroad safety] is so greatly at odds with the Congressional purpose of uniformity as to need no further argument.

Id. at 1238. *Accord CSX Transp., Inc. v. City of Thorsby*, 741 F. Supp. 889, 891 (M.D. Ala. 1990).

CSX Transportation, Inc. v. City of Plymouth, 86 F.3d 626 (6th Cir. 1996), thoroughly analyzes the foregoing principles. In *City of Plymouth*, the Sixth Circuit held that a municipal crossing blocking ordinance, *as applied to CSX Transportation's train operations,* related to railroad safety and was preempted under FRSA. In so holding the court opined that a municipal ordinance is preempted under FRSA if the ordinance relates to railroad safety, even if the DOT has not promulgated regulations that substantially subsume the subject matter of the ordinance. The court further noted that even if the municipal ordinance *on its face* does not regulate, *and is not intended to regulate,* any aspect of railroad safety, the ordinance will nonetheless be preempted under FRSA if the ordinance, *as applied*, has "a connection with" and thus in fact relates to railroad safety. As the Sixth Circuit commented:

> In determining whether the Plymouth ordinance has "a connection with" and is thus related to railroad safety, this court must necessarily look at the terms of the ordinance and what the ordinance requires in terms of compliance. * * * *It is on the basis of potential safety aspects of compliance with the ordinance that the challenged ordinance relates to railroad safety*.

Id. at 629 (emphasis added).

In this case, it would be sufficient for the court to determine that the Regulations, as applied to the Facility, relate to or have a connection with railroad safety to make a finding of FRSA preemption, even if, *on its face*, the Ordinance would appear to have no connection with or relate to railroad safety. However, the Ordinance as *applied* through the Permits does relate to

railroad safety because application of the Permits to the Facility will result in delay in the transportation of hazardous materials. Thus the Ordinance and Permit *as applied* are preempted by FRSA.

C. The Transportation (Including Transloading) of Hazardous Materials Is a Subject Matter that Relates to Railroad Safety

The transportation of hazardous materials by rail, including transloading incidental to transportation from rail to truck, is a subject that relates to rail safety. See, e.g., *CSX Transp., Inc. v. Pub. Utils. Comm'n*, 901 F.2d 497, 503 (6th Cir. 1990) (FRSA preempted Ohio regulation of rail transportation of hazardous material even though Ohio regulations were consistent with and identical to the DOT regulations), *CSX Transp., Inc. v. Williams*, 406 F.3d 667 (DC Cir. 2005) (FRSA preempted DC rail hazmat routing restriction due to hazmat security regulation of railroads by DOT under HMTA). Clearly, as the *PUCO* and *Williams* courts recognized, the transportation of hazardous materials is a subject that relates to rail safety. The DOT has issued comprehensive regulations relating to the subject matter of hazardous materials by rail, including ethanol. Ethanol is listed as a hazardous material by the DOT in 49 C.F.R. §172.101. NSRC is required to transport hazardous materials, such as ethanol, in compliance with not only all generally applicable DOT's hazardous materials safety regulations in 49 C.F.R. Parts 171, 172 and 173 but also all railroad specific safety regulations in 49 C.F.R. Part 174 which "prescribes requirements *in addition to those contained in parts 171, 172, 173, and 179 [rail tank car specifications*]... with respect to the transportation of hazardous materials in or on rail cars." See 49 C.F.R. §174.1 (emphasis added). Methods for transloading from rail to truck are regulated by DOT transloading safety regulations in 49 C.F.R. §174.67. "Transloading" of hazardous materials is regulated by DOT at 49 C.F.R. 171.1(c) as a "transportation function." Also see 70 Fed. Reg. 20018, 20020-20021 (April 15, 2005).

In addition, § 49 C.F.R. 174.14 (a) requires rail carriers to expedite en route delivery of hazardous materials from the point at which the shipment is received until it reaches its final destination, including forwarding loaded ethanol cars to yards along their route and constructively placing these cars at transfer stations - such as the ethanol transloading facility in Alexandria - in an expeditious manner. DOT has also issued regulations at 49 C.F.R. § 174.16(b)(2) on the storage of rail cars containing hazardous materials when delivery at final destination or transfer points cannot be expeditiously effectuated after notice of arrival has been sent to the consignee. Section 174.16(b)(2) allows for storage at the rail facility as long as safe storage is available. Clearly, DOT has recognized that the expedited transportation and delivery of hazardous materials, such as ethanol, is a subject matter that relates to railroad safety.

D. The Regulations As Applied to the Facility Are a Municipal Regulation That Relates to Railroad Safety and Are preempted Under FRSA.

In the instant case, the truck and time of day limitations imposed by the Permits delays the transportation of ethanol. These include delays in delivery to consignees of the ethanol product; delays resulting from congestion issues in the Yard and Facility; and interference with NSRC's efforts to expedite ethanol shipments in en route yards and at the Yard and Facility as required by DOT.

The Permits limit transloading activities to no more than 20 trucks per day. Since one rail tank car is transloaded into about 3.5 trucks, NSRC would be limited by the Permits to transloading no more than 5 to 6 tank cars of ethanol per day. If the truck access limitation was upheld, NSRC would have violated that limitation no less than 75 times. Exhibit 3. If NSRC attempted to comply with the limitation in the future, NSRC would be unable to transload the delivered ethanol into trucks in a timely and efficient manner. NSRC would be forced to store loaded tanks cars it could not transload at the Yard, disrupting service to the other customers that

NSR services through the Yard. McNeil Aff. ¶¶ 6-7. This, in turn, would delay delivery of cars containing both ethanol and other commodities, and cause other cars to back up at outlying yards along their route. The cascading effect of this would increase dwell time and transit time for the cars elsewhere in the NSRC system. McNeil Aff. ¶ 7. Transit time for ethanol tank cars being delivered to Alexandria will be delayed if the City is permitted to apply the terms of its Permit to the transloading Facility.

As the DOT has stated:

> The manifest purpose of the HMTA and the HMR is safety in the transportation of hazardous materials. Delay in such transportation is **incongruous** with safe transportation.

IR-2, *State of Rhode Island Rules and Regulations*, 44 Fed. Reg. 75566, 75571 (Dec. 20, 1979).

There is no question that transit time for ethanol tank cars being delivered to Alexandria will be delayed if the City is permitted to apply the terms of its Permit to the transloading Facility. The delay caused by the Permit "is **incongruous** with safe transportation." Because it will cause a delay in transportation of ethanol, a hazardous material, the Permit, as it is applied to NSRC's transloading activities at the Facility, is a municipal regulation that has a connection with and relates to railroad safety. The Regulations are preempted under FRSA and are void.

III. ORDINANCE, AS APPLIED TO TRUCKS TRANSPORTING ETHANOL TO AND FROM FACILITY, IS PREEMPTED BY HMTA

A. HMTA's Express Preemptive Provision Was Aimed at Regulations such as the Ordinance and the Permits

HMTA's express preemption provision, 49 U.S.C. §5125, provides, in relevant part, that State and local regulations are preempted when not "substantively the same"[6] as Federal

[6] DOT provides that the term " 'substantively the same' means that the non-Federal requirement conforms in every significant respect to the Federal requirement," although "[e]ditorial and other similar *de minimis* changes are permitted." 49 C.F.R. 107.202(d).

regulation regarding: (a) the packing, repacking, handling, labeling, marking, and placarding of hazardous material (49 U.S.C. §5125(b)(1)(B)); (b) the preparation, execution and use of shipping documents related to hazardous material and requirements related to the number, contents, and placement of those documents (49 U.S.C. §5125(b)(1)(C)). HMTA also prohibits States and localities from adopting hazardous materials routing regulations (limited to motor carriers) unless they have been presented to, and approved by, DOT. 49 U.S.C. §5125(c)-(d).

The provisions of Section 5125 were meant to apply to precisely the type of regulation presented by the Ordinance and the Permits:

> Many States and localities have enacted laws and regulations which vary from Federal laws and regulations pertaining to the transportation of hazardous materials, thereby creating the potential for unreasonable hazards in other jurisdictions and confounding shipper and carriers which attempt to comply with multiple and conflicting registration, permitting, routing, notification and other regulatory requirements. * * * In order to achieve greater uniformity and to promote the public health, welfare and safety at all levels, Federal standards for regulating the transportation of hazardous materials in intrastate, interstate, and foreign commerce are necessary and desirable.

Pub. L. No. 101-615, § 2, 104 Stat. 3244.

B. The Permit is Preempted under HMTA Because the City Did Not Follow Required DOT Procedures for Establishing Routing For Motor Carriers Transporting Hazardous Materials Such As Ethanol

Section 49 U.S.C. §5125(c) provides that local restrictions on the routing of hazardous materials by motor carriers may be authorized only if the local jurisdiction meets federal routing standards prescribed under §5112(b) which authorizes and requires DOT to establish routing standards. The standards are published in 49 CFR Part 397, Subpart C-E.

In mandating this program, Congress demanded that non-federal routes be shown to enhance public safety in the State and all affected jurisdictions outside the State. Section 5112(b)(1)(G) also demands that the non-federal routes "provide reasonable routes for motor

vehicles transporting hazardous material to reach places to load and unload hazardous material." The process for imposition of routing standards is published in 49 CFR §397.71. The statutory requirement that the routes provide motor carriers with reasonable access for loading, unloading, pickup and delivery of hazardous materials cargo is contained in §397.71(b)(7). DOT states in 49 C.F.R. §397.69 that if these standards are not followed, the routing requirement is preempted under the HMTA. The local nature of the routes is immaterial because it is assumed that even interstate transportation will entail local access to terminals and loading/unloading (in the instant case transloading) facilities. PDA-31(F), *District of Columbia Requirements for Highway Routing of Certain Hazardous Materials*, 71 Fed.Reg. 18137, 18141 (April 10, 2006).

The City of Alexandria did not comply with the required federal standards in establishing the routing or time-of-day restrictions in the Permit. The plain terms of the Permit restrict motor carrier access to the NSRC transloading facility and limit the daily transloading activity. Accordingly, the route designations and transportation operations curfews contained in the Permit are preempted.

C. Motor Carrier Transportation of Ethanol, Including Transloading Activities Related to This Transportation, Is Comprehensively Regulated by DOT

DOT has issued comprehensive regulations relating to transportation of hazardous materials, including transloading of ethanol, for both rail carriers and motor carriers. These regulations address all aspects of the safety and security of ethanol in transportation, including loading/unloading, vehicle placarding, and handling requirements in transit. See infra at 23 and 24 and 49 C.F.R. Parts 170-180 and Part 397. DOT has determined that railroad tank car unloading and re-containerization, i.e., when a carrier moves hazardous material from one transportation container to another, are "handling" processes. Carrier loading of the trucks also is a covered function. See PD-12(R) *New York Department of Environmental Conservation Requirements on*

the Transfer and Storage of Hazardous Waste Incidental to Transportation, 60 Fed. Reg. 62527, 62537 (Dec. 6, 1995) ("the prohibited repackaging activities fall within the scope of 'repacking' and 'handling,' specifically because they involve 'loading' and 'unloading.'").

The Permits directly affect the transloading of railroad tank cars into trucks because the Permits, on their face, limit both the daily number of trucks authorized to be transloaded from those tank cars, and the transloading hours of operation. The restrictions are comparable to those imposed by Nevada with respect to handling of certain hazardous materials. In its ruling, DOT found the Nevada limitations on loading, unloading, and storage were not substantively the same as the federal rules on the same subject matters and were preempted. Alexandria's limitations also are not substantively the same as the federal hazardous materials regulations on tank car unloading, operation of a transloading facility, truck loading, or the timing for such operations. See IR-19, *Nevada Public Service Commission Regulations Governing Transportation of Hazardous Materials*, 52 Fed.Reg. 24404 (June 30, 1987); IR-19(A), 53 Fed.Reg 11600 (April 7, 1988); affirmed in *S. Pac. Transp. Co. v. Pub. Serv. Comm'n,* 909 F.2d 352 (9th Cir. 1990).

The Permits' operational time restrictions affect the pace for transloading rail cars into trucks. These time limits affect the handling of the ethanol at the Facility and, as noted above, "handling" is a covered subject requiring preemption if the local restriction is not substantively the same as the federal provision. The federal rules contain no such time constraints on handling. The "absence of a more specific time limitation [in the federal regulations] on interim storage of hazardous materials in highway transportation reflects [DOT's] view that this type of limitation is not necessary or appropriate for materials that are not hazardous wastes. The Supreme Court has found that local requirements on transportation may be preempted when the DOT 'has decided that no such requirement should be imposed at all.' *Ray v. Atlantic Richfield*

Co., 435 U.S. 151, 171-72 (1978)," as cited in PD-23(RF), 66 Fed. Reg. 37260, 37266 (July 17, 2001).

The Permit expressly references the transportation of ethanol and lists some of the truck carriers which transport the ethanol as secondary applicants. Because each Permit requires that a copy be provided to and carried by each motor carrier driver, they appear to be, in effect, a local shipping authorization in document form. Such documentation is preempted as not substantively the same as the Federal requirements relating to "shipping documents related to hazardous material…." See 49 U.S.C. 5125(b)(1)(c). In this provision, Congress specifically found that additional documentation and information requirements in one jurisdiction create unreasonable hazards in other jurisdictions and could confound shippers and carriers which attempt to comply with multiple and conflicting regulations. *Colo. Pub. Utils. Comm'n v. Harmon*, 951 F.2d 1571, 1582 (10th Cir. 1991).

D. The Permits are Preempted by HMTA Because the Motor Carriers Cannot Comply with both the DOT Regulation and the Permit Requirements

Each tank car has a capacity exceeding that of each truck, i.e., multiple truck loads are required to accommodate product arriving at the Yard in a single tank car. Limiting the truck access necessarily will restrict tank car transloading, disrupting car supplies and delaying delivery of the product by motor carrier to its destination. This causes a direct conflict with the DOT mandate to deliver ethanol by motor carrier without unnecessary delay, which such mandate is found in 49 C.F.R. 177.800(d). See *infra* at 24 -25. As DOT has noted, States do not have "unfettered discretion to take actions which have the effect of restricting or delaying transportation being conducted in compliance with Federal law." IR-8(A), at 13003. DOT has long held that state and local requirements likely to cause delays in the transportation motor carrier transportation of hazardous are preempted under HMTA. *See* IR-2, *supra*, at 75571.

The Permit restricts the number of trucks that can be transloaded at the facility to no more than 20 per day, despite the fact that as many as 41 such trucks have already been transloaded in one day and that NSRC anticipates this number to increase in the future. Thus, as applied to transloading activities at the Facility, the Permit issued by the City pursuant to the Ordinance will result in an "unnecessary delay" for those trucks that cannot be transloaded at the Facility solely because the Facility may have already have transloaded 20 trucks that day. Since the delays occasioned by the Permit conflict with the federal regulations applicable to rail and motor carriers, and constitute an obstacle to the accomplishment of the objectives of the HMTA, the Permit is preempted under HMTA and thus void.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of November, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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